

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Investigation of Tariffs Filed by ACS of)	CC Docket No. 02-36
Anchorage, Inc., and the National Exchange)	
Carrier Association)	
)	
December 17, 2001)	CCB/CPD No. 01-23
MAG Access Charge Tariff Filings)	

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 2002

Released: May 31, 2002

By the Commission: Commissioner Abernathy issuing a statement; Commissioner Martin concurring and issuing a statement.

I. INTRODUCTION

1. In this order, we find that ACS of Anchorage, Inc., (ACS) has failed to demonstrate that the interstate access rates in its Tariff FCC No. 1, filed to become effective January 1, 2002, are just and reasonable. We also find that the interstate access rates that ACS did not revise in its December 17 tariff filing are unjust and unreasonable. We make these findings under section 201 of the Communications Act of 1934, as amended (the Act), which requires that all charges, practices, classifications, and regulations for communication services be just and reasonable,¹ as well as sections 204 and 205 of the Act, which authorize the Commission to review the reasonableness of carriers' rates, and to prescribe just and reasonable charges.² For the reasons discussed below, we direct ACS to file revised rates within ten days of the release of this order. We also direct ACS to make refunds to its customers for overcharges resulting from its unreasonable rates. Finally, we conclude that no further action is required regarding a related tariff filed by the National Exchange Carrier Association (NECA).

II. BACKGROUND

2. ACS is an independent incumbent local exchange carrier (LEC) serving Anchorage, Alaska, and its environs. ACS participates in NECA's interstate common line

¹ 47 U.S.C. § 201(b).

² 47 U.S.C. §§ 204 and 205.

access tariff,³ but files its own interstate traffic-sensitive switched access and special access tariffs. In June 2000, Anchorage Telephone Utility (ATU), ACS's predecessor, filed its annual access tariff pursuant to section 69.3 of the Commission's rules.⁴ The Description and Justification (D&J) supporting the 2000 filing stated that "[t]his filing reflects all identifiable Internet service provider (ISP) traffic as interstate."⁵ This tariff went into effect on July 1, 2000.⁶ In October 2000, ACS assumed the rates and terms of the ATU tariff.⁷

3. *GCI v. ACS Holdings*. In a January 2001 order captioned *GCI v. ACS Holdings*,⁸ the Commission adjudicated a complaint brought by General Communication, Inc. (GCI), against ACS and ATU and addressed ATU's cost allocation procedures. The Commission found, *inter alia*, that ATU: (1) improperly exceeded its prescribed rate-of-return in violation of the Act; and (2) improperly assigned, for separations purposes,⁹ the traffic-sensitive costs of ISP traffic to the interstate jurisdiction, rather than to the intrastate jurisdiction, as required by Commission orders.¹⁰ The Commission explicitly directed ATU to assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying ISP traffic, as described in the order.¹¹ Because ATU's improper practices allowed it unlawfully to exceed its prescribed rate of return, the Commission also awarded damages to GCI for ATU's overearnings.¹² The Commission stayed ACS's obligation to pay the damage award pending the appeal of the order.¹³

³ NECA files two separate tariffs for interstate access services -- one for common line services and the other for traffic-sensitive services -- for many smaller rate-of-return LECs. Rates in each tariff are based on the cost and demand of the LECs participating in the particular tariff. *See generally* 47 C.F.R. 69.601 *et seq.*

⁴ 47 C.F.R. § 69.3.

⁵ ATU Tariff Transmittal No. 108, D&J, at 14 (June 16, 2000).

⁶ 2000 Annual Access Filings, CC Docket No. 00-122, Memorandum Opinion and Order, 15 FCC Rcd 11741 (Competitive Pricing Division, released June 30, 2000).

⁷ *See* ACS Transmittal No. 1, dated Sept. 26, 2000, effective Oct. 11, 2000. Under Transmittal No. 1, ACS cancelled ATU's Tariff FCC No. 1 and reissued the entire tariff under its name without change.

⁸ *General Communication, Inc. v. Alaska Communications Systems Holdings, et al*, EB-00-MD-016, Memorandum Opinion and Order, 16 FCC Rcd 2834 (2001) (*GCI v. ACS Holdings*), *aff'd in part and reversed in part sub nom. ACS of Anchorage, Inc. v. FCC*, No. 01-1059 (D.C. Cir., decided May 21, 2002) (*ACS of Anchorage v. FCC*).

⁹ Jurisdictional separations is the process by which incumbent LECs apportion regulated costs between the interstate and intrastate jurisdictions. *See generally* 47 C.F.R. Part 36.

¹⁰ *See GCI v. ACS Holdings*, 16 FCC Rcd at 2840-54, paras. 16-50.

¹¹ *Id.* at 2863-64, paras. 75, 77, 79.

¹² *Id.*

¹³ *General Communication, Inc. v. Alaska Communications Systems Holdings, Inc., et al*, EB-00-MD-016, Order, 16 FCC Rcd 8169, 8170-71, paras. 3-4 (2001).

4. On May 21, 2002, the United States Court of Appeals for the D.C. Circuit resolved the appeal of the Commission's decision in *GCI v. ACS Holdings*.¹⁴ As relevant to this tariff investigation, the court rejected ACS's claim that the Commission had erroneously required it to allocate the traffic-sensitive costs associated with calls to ISPs to the intrastate jurisdiction. The court concluded that, in light of the pending proceedings before the Commission concerning the status of ISPs and revisions to the separations procedures, it could not find the Commission's jurisdictional assignment of ISP-related costs to be arbitrary or capricious.¹⁵

5. *Jurisdictional Separations Freeze Order*. In the May 2001 *Separations Freeze Order*, the Commission adopted certain recommendations for separations reform from the Federal-State Joint Board on Separations imposing an interim freeze for five years on certain aspects of the allocation factors used in the separations process.¹⁶ Among other things, the Commission reaffirmed that ISP traffic shall be treated as intrastate traffic for separations purposes.¹⁷ In that connection, the Commission also rejected a proposal of the Joint Board to compensate for increases in intrastate minutes, purportedly due to growth of ISP-bound traffic, by lowering and freezing the local dial equipment minute (DEM) factor at 95 percent of the current year level.¹⁸ The effect of such a DEM reduction would have been to shift costs to the interstate jurisdiction because the proposal would have lowered the intrastate DEM factor, thereby increasing the interstate DEM factor and the proportion of costs assigned to the interstate jurisdiction. Instead of adopting the DEM proposal, the Commission committed to seek specific comment on the status of this issue when it examines the effects of the separations freeze, and to work with the Joint Board to address the impact of ISP-bound traffic and the growth of local minutes during the interim freeze.¹⁹ The allocation factors the Commission adopted in the *Separations Freeze Order* for rate-of-return LECs therefore are to be developed based on studies that treat ISP traffic as jurisdictionally intrastate. The freeze became effective July 1, 2001, based on the carrier's calendar year 2000 separations studies.²⁰

¹⁴ *ACS of Anchorage v. FCC*, No. 01-1059.

¹⁵ *Id.* at 5-8. Although not relevant to this investigation, the court reversed certain Commission findings concerning ACS's obligation to make refunds of amounts collected from rates in effect in 1998 because those rates were deemed lawful and thus not subject to refund. The court remanded the issue of what refunds might be appropriate concerning the rates that were in effect during 1997 and the question of the appropriate rate of interest on any refunds that might be owing. *Id.* At 9-16.

¹⁶ *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11387-88, para. 9 (2001) (*Separations Freeze Order*).

¹⁷ *Id.* at 11402-03, paras. 39-42; *see also 2001 Annual Access Tariff Filings*, CC Docket No. 01-206, Memorandum Opinion and Order, 16 FCC Rcd 21519, 21524-27, paras. 11-19 (released Dec. 3, 2001) (rejecting Alltel's adjustment of its interstate DEM factor due to increased ISP traffic).

¹⁸ *Separations Freeze Order*, 16 FCC Rcd at 11399-11400, paras. 34-35, 11402-03, paras. 39-42.

¹⁹ *Id.* at 11403, para. 42.

²⁰ *Id.* at 11387-88, para. 9.

6. *Rate-of-Return Access Charge Reform Order.* In the *Rate-of-Return Access Charge Reform Order*, the Commission adopted comprehensive interstate access charge and universal service reforms for rate-of-return carriers, revising its access charge rules, effective January 1, 2002.²¹ LECs subject to rate-of-return regulation were required to revise their existing interstate access tariffs to implement the rule changes. Among other things, the Commission directed carriers to make cost reallocations that require reassignment of certain costs from specified interstate access categories to the common line category. Specifically, line port costs were required to be reallocated from local switching to the common line category.²² As a proxy for their actual line-port costs, however, carriers were permitted to shift 30 percent of their local switching costs to the common line category in lieu of conducting a cost study.²³ The order required that integrated services digital network (ISDN) line port costs in excess of basic analog line port costs be recovered through a new rate element.²⁴ It further required that the costs recovered through the transport interconnection charge (TIC) be reallocated among all the access categories, subject to a specific dollar limit equal to the TIC revenues for the twelve months ending June 30, 2001.²⁵ Many rate-of-return LECs file their own traffic-sensitive interstate access charge tariffs, but participate in the NECA interstate common line tariff. Therefore, the line port costs and certain TIC costs of LECs that file their own traffic-sensitive tariffs had to be removed from the LECs' revenue requirement and included in the NECA common line pool's revenue requirement.

7. *Procedural Order.* On November 26, 2001, the Competitive Pricing Division of the Common Carrier Bureau²⁶ released an order of general application establishing the procedures for the filing of revised interstate access charge tariffs required by the *Rate-of-Return Access Charge Reform Order*.²⁷ There, the Competitive Pricing Division stated:

This tariff filing should be a revenue neutral tariff filing. Therefore, all calculations

²¹ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613 (2001) (*Rate-of-Return Access Charge Reform Order*). "Rate-of-return" carriers are permitted to earn no more than a Commission-prescribed return on the investments that they make in providing interstate exchange access services. *See generally* 47 C.F.R. § 65.700 *et seq.*

²² *Id.* at 19654, para. 90.

²³ *Id.*

²⁴ *Id.* at 19656, para. 96.

²⁵ *Id.* at 19649, para. 76, 19658, para. 103; *see also Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Declaratory Ruling, 16 FCC Rcd 21931, 21932-33, at paras. 3-5 (Competitive Pricing Division, released Dec. 11, 2001) (*TIC Declaratory Ruling*).

²⁶ The Division and Bureau have since been renamed the Pricing Policy Division and the Wireline Competition Bureau, respectively.

²⁷ *December 17, 2001 MAG Access Charge Tariff Filings*, CCB/CPD File No. 01-23, Order, 16 FCC Rcd 20960 (Competitive Pricing Division, released Nov. 26, 2001) (*Procedures Order*).

should be based on the demand data used in the last annual tariff filing made by the carrier. Furthermore, [incumbent LECs] are reminded that shifts in revenue requirement to the NECA common line pool from the NECA traffic-sensitive pool or from another [incumbent LEC's] tariff should reflect equivalent adjustments to the underlying revenue requirements.²⁸

8. *Tariff Filings.* To implement the Commission's access charge reforms, effective January 1, 2002, ACS and NECA, along with other rate-of-return LECs, filed revised interstate access charge tariffs on or before December 17, 2001. This was ACS's first tariff filing since either the Commission's *Separations Freeze Order* or its order in *GCI v. ACS Holdings*. In its filing, ACS stated that "[t]he adjusted interstate revenue requirement reflects the impacts of mandated shifts in cost between the traffic sensitive and carrier common line cost pools."²⁹ It further stated that "[i]n preparing its revised interstate access rates, [it] used the same demand quantities as those contained in its original interstate access filing for the prospective period from July 1, 2000 through June 30, 2001."³⁰ GCI and AT&T Corporation (AT&T) filed petitions to suspend and investigate the ACS tariff.³¹ ACS did not respond to the two petitions.

9. *Suspension Order.* On December 31, 2001, the Competitive Pricing Division suspended for one day the LECs' access tariffs filed in response to the *Rate-of-Return Access Charge Reform Order*, imposed an accounting order, and initiated an investigation into the lawfulness of the rates contained in the tariff filings.³² After reviewing the initial tariffs, corresponding with the parties, and analyzing supplemental data and tariff revisions, the Division subsequently reconsidered on its own motion its decision to suspend and investigate the tariffs of all carriers other than the ACS tariff and NECA's common line tariff.³³

10. *Designation Order.* On February 15, 2002, the Competitive Pricing Division designated certain issues for investigation to ensure that ACS and NECA had correctly implemented the access charge reforms adopted by the Commission in the *Rate-of-Return Access Charge Reform Order*, and to determine whether ACS's interstate access rates not revised in the December 17 tariff filing were just and reasonable as required by section 201(b).³⁴ Specifically,

²⁸ *Id.* at 2, para. 3.

²⁹ ACS Transmittal No. 6, D&J, at 4.

³⁰ *Id.*

³¹ Petition of GCI (filed Dec. 21, 2001); Petition of AT&T Corp. (filed Dec. 26, 2001).

³² *December 17, 2001 MAG Access Charge Tariff Filings*, CCB/CPD File No. 01-23, Order, 17 FCC Rcd 116 (Competitive Pricing Division, released Dec. 31, 2001), *Erratum*, DA 01-3032 (Competitive Pricing Division, released Dec. 31, 2001) (collectively *Suspension Order*).

³³ *December 17, 2001, MAG Access Charge Tariff Filings*, CCB/CPD No. 01-23, Order on Reconsideration, 17 FCC Rcd 1786 (Competitive Pricing Division, released Jan. 30, 2002).

³⁴ *Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association*, CC Docket No. 02-36, CCB/CPD File No. 01-23, Order Designating Issues for Investigation, 17 FCC Rcd 2475 (Competitive Pricing Division, released Feb. 15, 2002) (*Designation Order*).

pursuant to sections 204 and 205 of the Act, the Competitive Pricing Division designated for investigation whether ACS: (1) used the appropriate baseline revenue requirement in making its December 17 tariff filing; (2) correctly determined the line-port costs to be reallocated to the common line category; (3) correctly reallocated the transport interconnection charge (TIC) among the access categories; and (4) developed all its access charge rates in a manner that reflects the appropriate baseline revenue requirement and the reallocations thereto. Due to the interrelationship between ACS's individual tariff and the tariff for the NECA common line pool, the Competitive Pricing Division also designated for investigation issues regarding NECA's common line rate development as it relates to the costs shifted to the NECA common line pool by ACS's reallocation of line-port and TIC revenue requirements.

11. ACS and NECA filed their direct cases on March 21, 2002, and March 28, 2002, respectively.³⁵ AT&T Corp. (AT&T) and GCI filed oppositions to the direct case of ACS on April 4, 2002.³⁶ ACS filed an opposition to NECA's direct case on April 4, 2002.³⁷ ACS filed a rebuttal to the oppositions on April 9, 2002.³⁸

III. DISCUSSION

12. Based on the statutory requirement that all charges for communication services be just and reasonable, we initiated this investigation of ACS's access charges pursuant to section 204 and 205 of the Act to determine whether ACS had properly implemented the rules adopted in the *Rate-of-Return Access Charge Reform Order* and whether its rates otherwise comply with certain Commission policies and orders. For the reasons discussed below, we find the ACS rates subject to this investigation are unjust and unreasonable.

A. ACS's Baseline Revenue Requirement

13. The initial issue designated for investigation is whether it was appropriate for ACS to use the revenue requirement underlying its 2000 annual access charge tariff filing, which counted ISP minutes of use as interstate, as the basis for its December 17 tariff filing. As noted above, ACS's December 17 tariff is the first tariff ACS has filed since the Commission issued its order in *GCI v. ACS Holdings* and its *Separations Freeze Order*. The *Designation Order* noted

³⁵ Direct Case of ACS of Anchorage, Inc., CC Docket No. 02-36 (filed Mar. 21, 2002) (ACS Direct Case); Direct Case of the National Exchange Carrier Association, Inc., CC Docket No. 02-36 (filed Mar. 28, 2002) (NECA Direct Case); *See Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association*, CC Docket No. 02-36, CCB/CPD File No. 01-23, Order, DA 02-505 (Competitive Pricing Division, released Mar. 1, 2002) (partially granting a request for an extension of time filed by ACS).

³⁶ Opposition of AT&T Corp. to the Direct Case of ACS of Anchorage, Inc., CC Docket No. 02-36, (filed Apr. 4, 2002) (AT&T Opposition); Opposition of General Communication, Inc., to the Direct Case of ACS of Anchorage, Inc., CC Docket No. 02-36 (filed Apr. 4, 2002) (GCI Opposition).

³⁷ Opposition of ACS of Anchorage, Inc., on the Direct Case of the National Exchange Carrier Association, CC Docket No. 02-36 (filed Apr. 4, 2002) (ACS Opposition).

³⁸ Reply of ACS of Anchorage, Inc., to Oppositions of General Communication, Inc., and AT&T Corp. to the Direct Case of ACS of Anchorage, Inc., CC Docket No. 02-36 (filed Apr. 9, 2002), *erratum*, (filed Apr. 10, 2002) (collectively, ACS Reply).

that ACS does not appear to have altered the allocation of ISP traffic costs that it employed prior to those orders and that the treatment of ISP minutes of use as interstate minutes appears to conflict with Commission orders requiring that ISP traffic costs be assigned to the intrastate jurisdiction for separations purposes.³⁹ The *Designation Order* directed ACS to submit, as part of its direct case, a recalculated interstate revenue requirement for the period July 1, 2000, to June 30, 2001, that complies with the Commission's decision in *GCI v. ACS Holdings*, and orders cited therein, and the requirements of the *Separations Freeze Order*.⁴⁰ The *Designation Order* also directed ACS to submit any studies of the allocation of costs, expenses, and revenues between the state and federal jurisdictions that it submitted in its rate case pending before the Regulatory Commission of Alaska.⁴¹ Finally, the *Designation Order* directed ACS to indicate in its direct case how it allocates revenues from the provision of Unbundled Network Elements (UNEs) between the interstate and intrastate jurisdictions and, if these revenues are allocated differently than the associated costs, to explain why the allocation process is different. If the allocation process is different, ACS was also directed to submit data reflecting the allocation of UNE revenues on a basis comparable to the allocation of the associated costs.⁴²

14. To determine whether ACS's revised interstate access rates are reasonable, we begin by examining the method ACS employed to calculate its interstate revenue requirement. If ACS unreasonably calculated its interstate revenue requirement, then all of the reallocations required by the *Rate-of-Return Access Charge Reform Order*, which are based on that revenue requirement, are potentially unreasonable as well. If these reallocations are unreasonable, then the rates that result from the reallocations may also be unreasonable. For the reasons discussed below, we find that ACS has failed to demonstrate that it reasonably calculated its interstate revenue requirement and we thus find that its resulting rates are unjust and unreasonable. Moreover, as described below, we find that ACS's access rates not revised in its December 17 tariff filing are also based on an improperly calculated interstate revenue requirement, and as such, those rates are also unjust and unreasonable.

15. All parties agree that ACS developed the interstate revenue requirement underlying its December 17 tariff filing by counting ISP minutes of use as interstate for separations purposes.⁴³ We agree with GCI and AT&T that counting ISP minutes as interstate directly violates Commission orders addressing the proper treatment of ISP traffic for separations purposes.⁴⁴ In *GCI v. ACS Holdings*, the Commission explicitly directed ATU to assign to the intrastate jurisdiction for separations purposes the traffic-sensitive costs of carrying

³⁹ *Designation Order*, 17 FCC Rcd at 2480, para. 10.

⁴⁰ *Id.* at 2480, para. 11.

⁴¹ *Intrastate Access Charge Revenue Requirement, Cost of Service, and Rate Design Study*, U-01-82.

⁴² *Designation Order*, 17 FCC Rcd At 2480-81, para. 12.

⁴³ ACS Direct Case at 6. ACS states that it used the same revenue requirement that it used in its 2000 annual filing. As noted above, ACS stated at the time of the tariff filing in 2000 that the revenue requirement for the access tariff filing was developed in a manner that "reflects all identifiable [ISP] traffic as interstate."

⁴⁴ AT&T Opposition at 1-4; GCI Opposition at 4-12.

ISP traffic.⁴⁵ In the *Separations Freeze Order*, the Commission again affirmed its long-standing policy of treating ISP traffic as intrastate for separations purposes, and it noted favorably the decision in *GCI v. ACS Holdings*.⁴⁶ Recently, in applying the *Separations Freeze Order* in another tariff investigation, the Commission noted that it "has not altered its jurisdictional separations rules or policies due to Internet usage . . ." and concluded that a carrier had improperly attempted to alter its DEM allocation factors to account for the alleged Internet traffic imbalance.⁴⁷ Similarly, by including in its December 17 tariff filing the costs of carrying ISP traffic in the interstate revenue requirement, ACS failed to comply with the Commission's requirements for allocating ISP-traffic costs addressed in *GCI v. ACS Holdings* and the *Separations Freeze Order*.⁴⁸ After the record closed in this investigation, the court in *ACS of Anchorage v. FCC*, affirmed the Commission's separations treatment of traffic-sensitive costs related to carrying ISP traffic .

16. Defending its December 17 tariff filing, ACS argues that the *Procedures Order* instructed ACS to use the revenue requirement from its July 2000 annual access tariff as the basis for the December 2001 tariff, and the revenue requirement of its July 2000 annual access tariff was calculated by treating ISP minutes as interstate.⁴⁹ It further asserts that it has harmonized the *Procedures Order* with *GCI v. ACS Holdings* and the *Separations Freeze Order* in the only way possible because to have done otherwise would have required it to conduct a new cost study, or revise its earlier cost study, either of which would have violated the only directive applying specifically to the December 17 tariff filing. We reject this argument. The *Procedures Order* gave general guidance to over 1200 rate-of-return regulated companies on the procedures to be followed in filing their December 17 tariffs. In directing that carriers base their December 17 filings on their last annual access tariffs, the order tacitly and justifiably assumed that prior tariffs complied with Commission rules and orders. Nothing in the division-level *Procedures Order* was intended to, or could have, countermanded the Commission's express findings or excused a carrier from compliance with the Commission's directives in *GCI v. ACS Holdings* or the Commission's long-standing policy that ISP traffic is to be treated as intrastate for separations purposes. ACS was unreasonable in its claimed belief that a division-level order of general application could excuse compliance with or overrule, by omission or silence, two specific, Commission-level orders that spoke directly to the precise issue in question. Taking ACS's argument at face value, its behavior is inexplicable, given that ACS adopted this course without bothering to seek clarification from the Commission, Bureau, or Division. While we do take ACS's arguments at face value, and address them as set forth above, ACS's arguments in this respect are without merit. In short, while the revenue requirement underlying the last annual

⁴⁵ *GCI v. ACS Holdings*, 16 FCC Rcd at 2863-64, paras. 75, 77, 79.

⁴⁶ *Separations Freeze Order*, 16 FCC Rcd at 11403, para. 42.

⁴⁷ *2001 Annual Access Tariff Filings*, CC Docket No. 01-206, Memorandum Opinion and Order, 16 FCC Rcd 21519, 21527, para. 18 (Dec. 3, 2001).

⁴⁸ Indeed, ACS tacitly admits to violating Commission orders in its direct case when it states that it expects to file rates in accordance with the directives of those decisions in its next tariff filing, effective July 1, 2002. ACS Direct Case at 11.

⁴⁹ *Id.* at 8-9.

tariff filing was to be the base on which the December 17 tariff filings were to be made, ACS should have reflected adjustments to that baseline to reflect Commission orders that directly affected the reasonableness of that base. It is well understood that carriers are obliged to comply with all Commission orders, and it was therefore not necessary that the *Procedures Order* specifically mention the need to comply with those orders.⁵⁰

17. We also find the use of the revenue requirement underlying the 2000 annual tariff filing unreasonable because it would enable ACS to double recover the costs of ISP traffic: once through interstate rates, and a second time through intrastate rates. In addition to assigning ISP traffic to the interstate jurisdiction in its federal tariffs, ACS has included ISP traffic-related costs in the rate case it has pending before the Regulatory Commission of Alaska.⁵¹ As part of that proceeding, the Alaska Commission has permitted ACS to assess an interim rate, although that rate is subject to refund upon the completion of the proceeding.⁵²

18. ACS also points out that the *Rate-of-Return Access Charge Reform Order* and the *Procedures Order* state that the tariff filing should be revenue neutral.⁵³ From this premise, it argues that it should not be required in its December 17 filing to forego revenue it received under its prior tariff. We find this assertion equally unavailing. Revenue neutrality, as used in those two orders, aimed to ensure that no carrier suffered an overall revenue loss as a result of the modifications adopted in the *Rate-of-Return Access Charge Reform Order*. It did not apply, nor could it plausibly have applied, to insulate carriers from claims that their December 17 filings unlawfully failed to comply with the *Rate-of-Return Access Charge Reform Order* or other applicable Commission precedents. ACS's December 17 filing relied on a revenue requirement from a previous tariff filing, unadjusted to reflect intervening Commission orders and in violation of long-standing Commission separations procedures; the revenue neutrality contemplated in the orders that ACS cites can provide it no protection from that infirmity in its tariff.

19. ACS also contends that the *GCI v. ACS Holdings* requirement to treat ISP traffic as intrastate only applies to ACS's monitoring reports. It asserts that there was no direction to modify any tariff rates and it would have been impossible for it to retroactively modify its 1999 and 2000 tariffed rates.⁵⁴ We find this contention lacks merit. Essentially, ACS argues that it should be allowed to include the cost of carrying ISP traffic in its interstate revenue requirement

⁵⁰ Nor does ACS's assertion that the *Separations Freeze Order* does not require ACS to modify its jurisdictional treatment of the traffic-sensitive costs of ISP-bound traffic in its December 17 tariff help ACS. See ACS Direct Case at 10. The separations rules are rules of general applicability and do not require any such specific directive. Second, it would not have been possible for that order to contain such a directive since the order establishing the December 17 tariff filing had not been issued.

⁵¹ See GCI Opposition at 14-17, noting that the interstate DEM factor underlying ACS's 2000 tariff filing was 21.8 percent, while in the intrastate rate proceeding, ACS indicated that the interstate DEM was only 12.7 percent.

⁵² ACS Reply at 5.

⁵³ ACS Direct Case at 10-11.

⁵⁴ *Id.* at 9-10.

for purposes of ratemaking underlying its interstate access tariff filings, but that when it comes time to file its monitoring reports on the financial results of those tariffs, those ISP costs should be excluded. The monitoring reports are the means by which the Commission determines whether rate-of-return carriers are exceeding the prescribed rate of return. Under ACS's approach, carriers would always overearn because the tariffs included costs that are not properly included in the interstate revenue requirement. Thus, ACS's interpretation is inconsistent with the general ratemaking principle that carriers are to target their rates to achieve the authorized rate of return. For ACS to conclude that the Commission would apply different separations procedures for ratemaking than it applies in monitoring those same activities clearly goes beyond any fair reading of the *GCI v. ACS Holdings* decision. The court in *ACS of Anchorage v. FCC* certainly addressed the substantive ratemaking implications of the separations process rather than the limited reading urged by ACS here.⁵⁵

20. The *Designation Order* also asked ACS to address its treatment of UNE revenues and expenses in the development of its interstate revenue requirement in order to determine whether the interstate revenue requirement resulted in just and reasonable rates. ACS states that it directly assigns both the revenues and expenses of UNE loops to the intrastate jurisdiction.⁵⁶ GCI asserts that even if ACS assigns both the revenues and expenses of UNE loops to the intrastate jurisdiction, any difference between UNE costs and embedded costs will be subject to the separations process.⁵⁷ As ACS notes, the Commission has never adopted any rules governing the allocation of UNE revenues and expenses.⁵⁸ Based on the present record, we are unable to conclude that ACS acted unreasonably in assigning UNE costs and expenses to the intrastate jurisdiction and conclude that further investigation of this issue is not warranted in the context of this proceeding.

21. Having determined above that the interstate revenue requirement underlying ACS's December 17 tariff improperly included costs attributable to ISP traffic that should have been treated as intrastate for separations purposes, and that ACS has failed to justify the rates developed using those revenue requirements, we find the rates revised in ACS's December 17 tariff filing unjust and unreasonable in violation of section 201(b) of the Act.

22. We also find ACS's interstate access rates not revised in the December 17 tariff filing, but which are based on the revenue requirement we have found to be improperly calculated due to the improper allocation of ISP traffic costs, to be unjust and unreasonable. As we have explained, these ISP traffic costs are not to be included in interstate rates. Because ACS has included such costs in its interstate revenue requirement, its interstate access rates have not been properly calculated. Indeed, this improper calculation has led ACS to assess interstate access rates that are higher than warranted by the underlying revenue requirement and associated demand. In light of these uncontroverted facts, we find that all of ACS's interstate access rates not revised in the December 17 filing, but which are based on the improperly calculated revenue

⁵⁵ *ACS of Anchorage v. FCC*, slip op. at 5-8.

⁵⁶ ACS Direct Case at 12-13. ACS states that it only provides UNE loops in Anchorage. *Id.* at 12 n.42.

⁵⁷ GCI Opposition at 16-17.

⁵⁸ ACS Direct Case at 12.

requirement, are unjust and unreasonable. We therefore next address the appropriate revenue requirement on which ACS must make the required cost reallocations and must establish revised access rates.

23. In Attachments A and B of its direct case, ACS submitted revised interstate revenue requirements as directed by the *Designation Order*. These submissions reflect the treatment of ISP traffic as intrastate. After reviewing this material and the supporting calculations, we conclude that Attachments A and B reflect the proper base-line revenue requirements for purposes of the *Rate-of-Return Access Charge Order*'s cost reallocations and for establishing just and reasonable interstate access charges. We reject GCI's assertion that ACS should use its March 2001 cost study⁵⁹ to develop all of its interstate access rates to ensure that all reallocations are revenue neutral and that cost levels are just and reasonable.⁶⁰ As part of a midyear tariff filing, ACS was not required to conduct a new cost study based on updated actual demand to make the reallocations. Likewise, in correcting for the inclusion of ISP traffic in the interstate jurisdiction, ACS was only required to adjust the cost study supporting the 2000 annual tariff filing to remove the effects of its improper inclusion. Therefore, we will rely on the revised revenue requirement data that ACS submitted in Attachments A and B as we proceed to address the remaining issues in this investigation.

B. ACS's Reallocation of Line-port Costs

24. The second issue designated for investigation is whether ACS correctly calculated the amount of line-port costs to be reallocated to the common line category. ACS used the revenue requirement underlying its 2000 tariff filing to calculate its line-port cost. The *Designation Order* directed ACS to submit the line-port costs to be reallocated to the common line category based on the recalculated interstate local switching revenue requirement submitted in response to Issue A, above, using the 30 percent factor it opted to use in its December 17 tariff filing.

25. In section A, we determined the appropriate method for calculating the base-line interstate revenue requirement in ACS's December 17 tariff filing, and we determined that ACS correctly calculated a revised revenue requirement in its direct case. Because ACS's determined its line-port cost based on the revenue requirement underlying its 2000 annual tariff, the line-port cost ACS reallocated to the common line category for purposes of its December 17 tariff filing was incorrect. In Attachment F to its direct case, ACS submitted a calculation of the line-port costs to be reallocated to the common line category based on the revised interstate revenue requirement. After reviewing the record in this investigation, we conclude that, in its Attachment F, ACS correctly applied the 30 percent proxy to the revised interstate local switching revenue requirement to reallocate the line-port costs to the common line category.

⁵⁹ ACS performed a cost study in March of 2001 for NECA that treated ISP traffic as intrastate. That cost study apparently was used by NECA to determine ACS's line port costs for purposes of NECA's December 17 common line tariff filing.

⁶⁰ GCI Opposition at 21.

C. Reallocation of ACS's TIC Revenue Requirement

26. The third issue designated for investigation is whether ACS correctly reallocated its TIC revenue requirement. In reallocating the TIC amount among the other access categories, ACS used the revenue requirement underlying its 2000 tariff filing. The *Designation Order* directed ACS to submit, as part of its direct case, a recalculated TIC revenue requirement derived from the revised interstate transport revenue requirement calculated in connection with issue A.⁶¹ ACS was also directed to recalculate the amount of its TIC revenues for the twelve-month period ending June 30, 2001, as if it had established TIC rates based on that revised revenue requirement.

27. In section A, we determined the appropriate base-line interstate revenue requirement for ACS's December 17 tariff filing. Because ACS determined its TIC reallocations based on the revenue requirement underlying its 2000 annual tariff, the TIC reallocation for purposes of its December 17 tariff filing was incorrect. In Attachment G to its direct case, ACS submitted a calculation of the line-port costs to be shifted to the common line category based on the revised interstate revenue requirement. After reviewing the record in this investigation, we conclude that ACS correctly determined the revised TIC revenue requirement to be reallocated among the access categories and properly calculated the respective reallocations.

D. Prescription of Revised Interstate Access Rates and Refunds

28. The fourth issue designated for investigation concerns ACS's interstate access rates. To calculate its rates for the December 17 tariff filing, ACS began with the revenue requirement underlying its 2000 annual access charge tariff filing. It adjusted the revenue requirements for the calculations described in the previous two sections. Using demand levels from its 2000 annual access charge tariff filing, ACS calculated new rates for the elements listed in its D&J accompanying its tariff filing.⁶² ACS did not change its existing local switching rate of \$0.011373 per minute, which it states is already lower than the rate of \$0.012253 that it could have charged pursuant to its cost support data.⁶³ ACS also did not change certain non-recurring charges and other miscellaneous charges. The *Designation Order* directed ACS, as part of its direct case, to submit revised tariff rates for all access charge elements based on the recalculated revenue requirements described in sections A-C, above.⁶⁴ The *Designation Order* also invited parties to comment on which rates might appropriately be adjusted effective January 1, 2002, under the provisions of section 204, and which may only be modified prospectively.⁶⁵

29. In section A, above, we found that the revenue requirements underlying ACS's

⁶¹ See *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992).

⁶² ACS Transmittal No. 6, D&J, at 6-8.

⁶³ *Id.* at 12.

⁶⁴ *Designation Order*, 17 FCC Rcd at 2484, para. 23.

⁶⁵ *Id.*

December 17 tariff filing were excessive and therefore resulted in unjust and unreasonable interstate access charges. In that section, we also determined that ACS's revised revenue requirement calculations submitted in response to the *Designation Order* were calculated appropriately and constituted the proper base on which to apply the line-port and TIC cost reallocations adopted in the *Rate-of-Return Access Charge Reform Order* and, after making those reallocations, to develop revised interstate access charges. As part of its direct case, ACS also provided, in Attachment H, revised rates based on the revised revenue requirements and demand figures. After reviewing the record and the methodology for calculating the revised access rates, we find that the rates contained in Attachment H are correctly developed.⁶⁶ We therefore direct ACS to file tariff revisions to its Tariff FCC No. 1 reflecting the rates in Attachment H.⁶⁷ This tariff transmittal shall be filed within ten calendar days of the release of this order and be made effective on five days' notice.

30. Under section 204, the Commission may, at the conclusion of a tariff investigation, order the "interested carrier or carriers to refund with interest . . . such portion of such charge for a new service or revised charges as by its decision shall be found not justified."⁶⁸ Thus, under this provision, refunds in the instant case are limited to those rate elements for which ACS filed revised rates in its December 17 tariff filing. ACS argues that a refund would be punitive, and is subject to the Commission's discretion, and urges the Commission to make any rate change prospective only and not award any refunds.⁶⁹ ACS contends that it has complied with the *Rate-of-Return Access Charge Reform Order* and the *Procedures Order* and cannot be punished if the Commission failed to speak clearly.⁷⁰ AT&T and GCI, on the other hand, urge that the rates be made effective January 1, 2002, because IXCs have paid the higher rates to cover the costs attributable to ISP traffic.⁷¹

31. We disagree with ACS's assertion that ordering a refund is a punitive measure. A refund ensures that a carrier's access customers pay rates calculated in accordance with our rules. Even if it were ordered to make a refund, ACS would continue to earn a fair rate of return on its interstate rate base, as specified by our rules. By contrast, failing to order a refund would leave IXCs in the position of having paid rates that we had found to be unreasonably high.⁷² Accordingly, we direct ACS to refund the difference between the revised rates that ACS filed in its December 17 tariff filing and the rates we prescribe herein for the period January 1, 2002,

⁶⁶ We addressed GCI's argument that updated actual traffic data should have been used in setting the local switching rate in paragraph 23, *supra*.

⁶⁷ We note that pursuant to section 69.3, ACS will be filing revised tariffs in June of this year to become effective on July 2, 2002. See *July 2, 2002 Annual Access Charge Tariff Filings*, WCB/Pricing 02-12, Order, DA 02-970 (Pricing Policy Division, released April 26, 2002).

⁶⁸ 47 U.S.C. § 204(a)(1).

⁶⁹ ACS Direct Case at 19-20.

⁷⁰ *Id.* at 21.

⁷¹ AT&T Opposition at 4-5; GCI Opposition at 22-26.

⁷² *Id.*

through the effective date of the revised tariff rates.⁷³ ACS will also be required to pay interest on the refund amounts until the refunds are paid, to be computed on a daily compounded basis at the applicable IRS corporate overpayment rate. This is the rate that we have used in past refunds resulting from tariff investigations and reflects the corporate nature of the IXC's that were assessed the excessive access charges and will be the recipients of the refunds.⁷⁴ ACS shall file a refund plan within 60 days of the release of this order.⁷⁵

E. NECA's Common Line Rate Development

32. The investigation of the NECA common line tariff is a limited one, triggered by the interrelationship between the traffic-sensitive tariffs of rate-of-return LECs that file their own traffic-sensitive tariffs and the NECA common line pool. The *Rate-of-Return Access Charge Reform Order* required rate-of-return LECs to reassign line-port costs and a portion of the TIC from specified interstate access categories to the common line category. Many rate-of-return LECs file their own traffic-sensitive tariffs, but participate in the NECA common line tariff. Therefore, the line-port costs and certain TIC costs of LECs that file their own traffic-sensitive tariffs must be removed from the LECs' revenue requirements underlying their traffic-sensitive tariffs and included in the NECA common line pool's revenue requirement. Any changes that we direct ACS to make in its allocations could affect NECA's calculation of carriers' common-line costs and thus affect one or more of the common line rates in the NECA common line tariff. The *Designation Order* directed NECA, as part of its direct case, to submit the common line revenue requirement underlying the December 17 tariff filing that was attributable to ACS. The *Designation Order* also directed NECA to submit the common line revenue requirement ACS provides to NECA as a result of the recalculations required for issues A through C, above. Finally, the *Designation Order* directed NECA to submit the revised rates that would result from these revised common line revenue requirement amounts if the Commission were to require ACS to comply with the revised interstate revenue requirements.

33. In its direct case, NECA submitted documentation showing the calculation of its common line rates based on ACS's revised revenue requirement data and line-port and TIC reallocations. NECA's common line tariff establishes different rate levels, or bands,⁷⁶ based on a carrier's cost per line, to establish multiline business subscriber line charges (SLCs). The revised data resulted in ACS being reclassified from band 8 to band 9 for purposes of its multiline business SLC, which would result in ACS's multiline business customers paying a

⁷³ Because the revised rates filed by ACS in its December 17 tariff filing were suspended for one day, they did not obtain deemed lawful status. Accordingly, there is no bar to refunds in this case.

⁷⁴ *Long-term Telephone Number Portability Tariff Filings of Ameritech Operating Companies, Pacific Bell, Southwestern Bell Telephone Companies, and U S West Communications, Inc.*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 17339 (1999).

⁷⁵ Given that the Court has resolved the appeal of the *GCI v. ACS Holdings* order, *see supra*. Paragraph 4, we need not address ACS's contingent request for a stay, which was premised on the Court's not having acted by May 31, 2002.

⁷⁶ In its December 17 tariff filing, NECA introduced rate bands for its multiline business SLCs. These bands are established by assigning carriers to groups based on their average cost per line. Rates are then determined based on the costs of the group.

higher SLC.⁷⁷ There was no change in NECA's carrier common line charge as a result of the adjustments NECA made to reflect ACS's revised revenue requirement calculations.⁷⁸ In response to NECA's direct case and noting the requirement of the *Procedures Order* that ACS and NECA make equivalent adjustments to their respective revenue requirements, ACS requests that the Commission order NECA to increase ACS's common line revenue requirement by \$1,083,238 on an annualized basis to reflect 30 percent of ACS's interstate local switching revenue requirement filed in support of its 2000 annual tariff filing. Alternatively, if the Commission finds that the revised revenue requirement is correct, ACS requests the Commission to require NECA to increase its common line revenue requirement by \$145,498 on an annualized basis.⁷⁹ ACS also requests that NECA be ordered to refund the shortfall in settlements that has resulted from this under-inclusion of its revenue requirements in the NECA common line pool.⁸⁰

34. We conclude that no further action is required with respect to the NECA common line tariff. The resulting change reflected in NECA's direct case would be an increase in the multiline business SLC that ACS could assess. Likewise, ACS's two requests to adjust the NECA common line pool's revenue requirement would not result in reduced rates. There is therefore no need for the Commission to order NECA to file revised tariffs to reduce any rate in the common line pool, or to obtain a refund for any customer taking service from a carrier participating in the NECA common line pool. NECA, of course, may file revised rates if it chooses. Alternatively, it may revise its tariffed rates in connection with its upcoming annual tariff filing to be effective on July 2, 2002.⁸¹ Questions about the appropriate settlements from the NECA pool may be left, in the first instance, to the procedures governing pool distributions and the true-up procedures that are associated with the pool's operation.

IV. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201(b), 203(a), 204(a), 205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(a), 204(a), 205, and 403, ACS of Anchorage, Inc., SHALL FILE REVISED RATES, as described in paragraphs 28-31 above, no later than ten (10) calendar days from the release date of this order. These rates SHALL BE EFFECTIVE on five (5) days' notice. For this purpose, we waive section 61.58 of the Commission's rules, 47 C.F.R. § 61.58.

36. IT IS FURTHER ORDERED that ACS of Anchorage, Inc., SHALL refund the difference between the revised rates that ACS filed in its December 17 tariff filing and the rates we prescribe herein for the period January 1, 2002, through the date its revised rates become

⁷⁷ NECA Direct Case at Exhibit 2.

⁷⁸ *Id.* at Exhibit 3 n.2.

⁷⁹ ACS Opposition at 4-5; *see also* ACS Direct Case at 14.

⁸⁰ ACS Opposition at 4-5.

⁸¹ *See July 2, 2002 Annual Access Charge Tariff Filings*, WCB/Pricing 02-12, Order, DA 02-970 (Pricing Policy Division, released April 26, 2002).

effective. ACS will also be required to pay interest on the refund amounts until the refunds are paid. ACS SHALL FILE a refund plan within sixty (60) days of the release of this order.

37. IT IS FURTHER ORDERED that the investigation IS TERMINATED.

38. IT IS FURTHER ORDERED that the accounting order applicable to ACS of Anchorage, Inc., and to the National Exchange Carrier Association, Inc., IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association; December 17, 2001 MAG Access Charge Filings, CC Docket No. 02-36, CCB/CPD No. 01-23 (adopted May 31, 2002)

The question of how to allocate the costs of carrying ISP-bound traffic presents a complex set of issues. On the one hand, carriers have made persuasive arguments that intrastate revenues may be insufficient to allow full recovery of the costs associated with the growth in ISP-bound traffic. Most subscribers pay flat rates, and thus pay no additional charge when they spend hours connected to the Internet. On the other hand, because the revenues collected from ISPs are intrastate in nature — ISPs purchase service out of local business tariffs and do not pay interstate access charges (under the longstanding “ESP exemption”) — the Commission has held that accompanying costs also must be recovered from the intrastate jurisdiction. The D.C. Circuit recently upheld that decision, finding it reasonable to conclude that costs and revenues should be subject to the same jurisdictional allocation.¹

While I recognize ACS’s interest in establishing a different cost-recovery approach for ISP-bound traffic — and I look forward to considering that issue in proceedings pending before the Commission — there is no question that our *existing* rules do not permit carriers to allocate the traffic-sensitive costs of carrying ISP-bound traffic to the interstate jurisdiction. The tariff at issue thus is clearly unlawful. Carriers are not free to disregard our rules simply because they believe those rules should be changed. Accordingly, any decision upholding this tariff would undermine respect for our rules and thus would be unacceptable regardless of how ISP-bound traffic should be treated on a going-forward basis.

¹ *ACS of Anchorage, Inc. v. FCC*, No. 01-1059 (D.C. Cir. Decided May 21, 2002).

**CONCURRING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re: Investigation of Tariffs Filed by ACS of Anchorage, Inc. and the National Exchange Carrier Association; CC Docket No. 02-36

December 17, 2001 MAG Access Charge Tariff Filings CCB/CPD No. 01-23

I am concerned by some aspects of this Order's finding that ACS's interstate access tariff is unlawful. Part of this Order addresses ACS's effort, in setting its interstate access rates, to account for the impact of Internet traffic.

While I do not endorse ACS's actions, I reject the Order's suggestion that carriers may not, in allocating costs between the interstate and intrastate jurisdictions, attempt to account for the unique nature of Internet traffic.

Last December, I noted the Commission's apparent unwillingness to address the concerns raised by many states and the Separation Joint Board regarding the growing amount of Internet traffic and its significant impact on the cost allocation process. Since that time, Internet traffic on the network has grown and the Commission has failed to act on either the pending petition for reconsideration that challenges the Commission's Separations Freeze Order and the underlying policy classifying Internet traffic as intrastate for jurisdictional purposes, or requests to reform our process to take this traffic into account (e.g., through an adjustment to the DEM weighting mechanism).

I continue to believe that the Commission should move forward on this pending issue and alter the separations rule in some manner, as was proposed by the Joint Board. Indeed the Joint Board suggested specific adjustments that could be made if the Commission could not determine the precise impact of Internet traffic. In the absence of Commission action on this issue—which I continue to encourage—carriers should not be prohibited from addressing this issue in some manner.

In my view, our inconsistent and conflicting regulatory treatment of Internet traffic created the circumstances that led to ACS's cost allocation problems. Moreover, the Court's second rejection of our end-to-end analysis classifying Internet traffic as "interstate" for compensation purposes creates only further uncertainty in the marketplace.

In rejecting the Joint Board's specific separations proposal, the Commission committed to seek specific comment on the status of this issue and work to address the impact of ISP-bound traffic and the growth of local minutes during the interim freeze.

In light of the concerns I raised last December, and the Commission's continued failure to even begin addressing this issue, I am finding it increasingly difficult to find fault with a particular carrier's attempts to do so.

Accordingly, I concur in the result of the Order.